Supreme Court, U. S.
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No. 74-450

In the Supreme Court of the United States

OCTOBER TERM, 1974

ALEXANDER P. BUTTERFIELD, ADMINISTRATOR OF THE FEDERAL AVIATION ADMINISTRATION, ET AL., PETITIONERS

v.

REUBEN B. ROBERTSON, III and JEROME B. SIMANDLE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR PETITIONERS

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. Respondents have made no attempt to refute the extensive legislative history, discussed in the petition (pp. 13-15), demonstrating that, in exemption 3 of the Freedom of Information Act, Congress intended to preserve intact the numerous previously enacted statutes providing for confidential treatment of material in the government's possession. Instead, they attempt to minimize the importance of the case, suggesting that it "only presents a question as to the applicability of section 1104 to exemption 3" (Br. in Opp. 9). But the issue presented in our petition broadly involves the scope of exemption 3 itself and not merely its application to the particular confidentiality statute involved in this case.

The question we are asking the Court to decide is whether exemption 3 applies to all specific nondisclosure statutes, as we submit Congress intended, or whether it covers only certain nondisclosure statutes which are to be identified under judicially created standards, as the court of appeals held in this case. If our view of exemption 3 is sustained in this case, it will largely resolve the issue of its application to the nearly 100 statutes which provide in various ways for the confidential treatment of government material (see Pet. 9). In any event, this Court's interpretation of exemption 3 will provide standards and guidance to the courts of appeals in resolving the substantial and apparently growing volume of litigation under that provision.

2. The confusion and uncertainty among the circuits over the meaning of exemption 3, which we discussed in our petition (Pet. 16-17), has been increased by the recent decision of the Court of Appeals for the Ninth Circuit in *People of California* v. *Weinberger*, No. 73-1494, decided November 7, 1974, subsequent to the filing of our petition. Contrary to *Schechter* v. *Weinberger*, No. 73-1797, decided October 3, 1974 (C.A.D.C.), *Stretch* v. *Weinberger*, 495 F. 2d 639 (C.A. 3) and *Serchuk* v. *Weinberger*, 493 F. 2d 663 (C.A. 5), *People of California* holds that 42 U.S.C. 1306(a) is a statute that specifically exempts material from disclosure, within the meaning of exemption 3.[1] (The opinion is set forth in the appendix hereto.)

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[1]The government does not intend to petition for a writ of certiorari in *Serchuk* or *Schechter*, since we have been advised that the Department of Health, Education and Welfare is planning to issue proposed regulations, pursuant to the specific authority in 42 U.S.C. 1306(a), which will authorize disclosure of the materials being sought in those cases. If those regulations are adopted, the cases will become moot.

3. The respondents contend that review is not appropriate at this time because the court of appeals has remanded the case to the district court to consider three other exemptions in the Freedom of Information Act upon which the government has also relied (exemptions 4, 5 and 7) (Br. in Opp. 12). Review is warranted now, however, because in this decision the court of appeals has rendered a definitive interpretation of exemption 3, which will control its meaning in the District of Columbia Circuit, where a major portion of all Freedom of Information Act litigation takes place.[2] The rulings of the district court on remand on the other exemptions will not clarify or sharpen the exemption 3 issue here presented.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.

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[2]As we noted in our petition (p. 11), the presence of most agencies in the District of Columbia makes the views of that Circuit Court of Appeals of special importance. Indeed, more than half of all Freedom of Information Act cases are brought in the District of Columbia. (Thus 51 of the 91 Freedom of Information Act cases handled by the Civil Division on November 1, 1974 were filed in the District.)

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PEOPLE OF THE STATE OF CALIFORNIA, acting by and through EVELLE J. YOUNGER as Attorney General of California; CALIFORNIA LEGISLATIVE COUNCIL FOR OLDER AMERICANS; SAN FRANCISCO CHAPTER OF THE CALIFORNIA LEGISLATIVE COUNCIL FOR OLDER AMERICANS; and YOUNG PEOPLE FIFTY AND OVER, unincorporated associations,
Plaintiffs-Appellants,

v.

CASPAR W. WEINBERGER, as Secretary of the United States Department of Health, Education, and Welfare; and MERCIA L. KAHN, as Regional Representative of the Bureau of Health Insurance, United States Department of Health, Education, and Welfare,
Defendants-Appellees.

No. 73-1494

OPINION

Filed November 7, 1974

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Before: DUNIWAY and TRASK, Circuit Judges, and SMITH*, District Judge

SMITH, District Judge.

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*The Honorable Russell E. Smith, Chief Judge of the United States District Court for the District of Montana, sitting by designation.

Appellants, relying on the Freedom of Information Act (5 U.S.C. §552), sought the disclosure of "Extended Care Facility Survey Reports" which were in the custody of the Secretary of Health, Education and Welfare. These are reports by which state agencies annually inform the Secretary about the performance of nursing and old-age homes which receive federal funds under the Medicare program. The Secretary refused to disclose. Appellants brought an action to compel disclosure. 5 U.S.C. §552(a)(3). The district court denied relief and this appeal followed.

The Freedom of Information Act requires the disclosure of the records of federal agencies but provides for exceptions, one of which is:

> "(b) This section does not apply to matters that are—
>
> * * *
>
> (3) specifically exempted from disclosure by statute;"

The question posed is whether 42 U.S.C. §1306(a) relating to disclosure of Health, Education and Welfare records, reading in part,

> No disclosure of any . . . report . . . obtained at any time by the Secretary . . . or by any officer or employee of the Department . . . in the course of discharging their respective duties under this chapter [the chapter on social security] shall be made except as the Secretary . . . may by regulations prescribe . . . ,

specifically exempts from disclosure the reports here sought.

The question has been answered both ways. The case of *Stretch* v. *Weinberger*, 495 F. 2d 639 (3d Cir. 1974), held that these reports were not exempted from disclosure. The dissenting opinion[1] of Judge MacKinnon in *Schechter v. Weinberger*, 498 F. 2d 1015 (D.C. Cir. 1974), reached the opposite conclusion. We agree with Judge MacKinnon. To us his analysis of *Stretch v. Weinberger, supra,* and his analysis of legislative history of 42 U.S.C. §1306, including the Social Security Amendments of 1972 (86 Stat. 1428, 1461-1462 (1972)), are persuasive.

To what Judge MacKinnon has said we add these observations: It appears to us that when Congress used the word "specifically" it was requiring no more than that the exemption be found in the words of the statute rather than the implication of it. If an act were to exempt "all records" of a given agency, we believe that "all records" would be specifically exempted even though they were not described with "some degree of particularity." This view is contrary to the one expressed in *Stretch*.

We do not believe that Section 1306 was an "authorization for administrative exemption,"[2] but if we did we would agree with the conclusion reached in *Stretch*. We think the words of Section 1306, "no disclosure . . . shall be made," are words of congressional exemption which prohibit disclosure and that the words "except as the Secretary . . . may by regulation prescribe" are words allowing the Secretary to relax the absolute prohibition established by Congress. We realize that as a practical matter there may not be much difference in effect between a congressional exemption with power in the Sec-

[1]The majority opinion did not reach the question.

[2]This seems to have been the Secretary's argument in the *Stretch* case. See *Stretch v. Weinberger, supra,* at 640.

retary to relax it and a congressional authorization of administrative exemption. Where, however, as here, we seek the meaning of congressional language, particularly the words "specifically exempted from disclosure by statute," there is a real difference between a statute in which the congressional words themselves prohibit disclosure and a statute which authorizes an administrator to exempt from disclosure. In the latter case the exemption is the creature of the administrator and does not fall within the meaning of the words "specifically exempted . . . by statute."

The judgment is affirmed.

DUNIWAY, Circuit Judge, dissenting:

I would reverse the judgment in this case. The question presented is not an easy one, but I believe that the court in *Stretch v. Weinberger*, 3 Cir., 1974, 495 F. 2d 639, correctly construes the Freedom of Information Act and 42 U.S.C. §1306(a). *See also Serchuk v. Weinberger*, 5 Cir., 1974, 493 F. 2d 663, which follows *Stretch, supra; Schechter* v. *Weinberger*, D.C. Cir., 1974, F. 2d (No. 73-1797, October 3, 1974). *Cf. Robertson v. Butterfield,* D.C. Cir., 1974, 498 F. 2d 1031. In my opinion, *Environmental Protection Agency v. Mink*, 1973, 410 U.S. 73, does not require affirmance in this case. It dealt with a different exemption, and see the Court's comment at p. 80 and fn. 6. I do not find Judge MacKinnon's dissent in *Schechter v. Weinberger*, D.C. Cir., 1974, 498 F. 2d 1015, as persuasive as my brothers do.